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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1061

W. W. HINCHLIFFE,

Petitioner,

vs.

THE TEXAS COMPANY, OHIO OIL COMPANY, AMERADA OIL CORPORATION, DEEP ROCK OIL CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN, AND BRIEF IN SUPPORT THEREOF.

TOMAS G. POLLARD,
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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1061

W. W. KINCHLIFFE,
Petitioner and Appellant below,

vs.

THE TEXAS COMPANY, OHIO OIL COMPANY, AMERADA OIL CORPORATION, DEEP ROCK OIL CORPORATION
Respondents and Appellees below

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

This is an action in the nature of an appeal from an order of the Railroad Commission of Texas under its Rule

37 granting your petitioner, W. W. Hinchliffe, the right to drill wells Nos. 3 and 4 on his leasehold in the East Texas Oil Field in order to prevent waste and confiscation. The suit was instituted in the District Court of the 126th Judicial District of Texas, Travis County, Texas, by the respondents against the petitioner and the Railroad Commission of Texas, alleging such order of the Railroad Commission was void and should be set aside because not supported by evidence, and that neither of the wells so granted was necessary to prevent waste or to prevent confiscation of petitioner's property.

The petitioner in defense pleaded, among other defenses, as follows:

> 1. That the Railroad Commission of Texas is the agency charged by law with the duty of administration of Rule 37, and that such agency in the administration of such rule had construed same as permitting an exception to be granted under the terms of such rule to applicants upon a showing of a prevention of waste by the increasing of the ultimate recovery of oil from the drilling and production of such well; that this amounted to a practical construction of the rule and such practical construction was plead in bar to the suit (R. 22).
>
> The plaintiffs specially excepted to the allegations of defendant's answer setting up this special defense on the grounds (a) the allegations were irrelevant, immaterial and prejudicial, and (b) the allegations were inconsistent with the allegations that said rule is invalid, and defendant may not attack the rule and at the sametime construe it (R. 33).
>
> The trial court sustained the exception of the plaintiffs to said allegations, thereby depriving the defendant of offering any testimony in support of this special defense, and the petitioner reserved an exception to such ruling (R. 39).

2. That a vast number of permits in exception to Rule 37 had been granted in the East Texas field upon the ground and reason that such permits would respectively increase the ultimate recovery of oil solely by reason of the fact that the more wells that are drilled the greater will be the recovery of oil from such field; that such wells are now operating and will continue to do so during the producing life of said field; that the field had been developed upon such theory; and that to deny defendant the same right would amount to an unjust discrimination, denial of equal protection of the laws and a taking of his property without due process (R. 23-24).

The plaintiffs addressed special exception to these allegations on the grounds (a) that defendant had an adequate remedy in filing suit to cancel the permits complained of, and that such allegations were irrelevant, immaterial and prejudicial; and (b) the defendant was not entitled to uphold his permits on such ground because the same right being applicable to all other operators, there would result a complete destruction of the spacing rule and its usefulness as a conservation measure (R. 33-34).

The court sustained said exceptions, thereby depriving Hinchliffe of proving the facts alleged and of using the same as a defense, and the petitioner reserved an exception to such ruling (R. 39).

3. That the Railroad Commission of Texas had prior to the time of the granting of the permits to petitioner granted numerous permits in the East Texas Oil Field to other persons similarly situated to petitioner where all of the factors and conditions surrounding the granting of such permits were the same as surrounded petitioner and his property on which the permits in question were granted (R. 24).

Plaintiffs specially excepted to such allegations because (a) irrelevant, immaterial and prejudicial, (b) the legal conclusion of the pleader, and (c) vague and indefinite (R. 34).

The trial court sustained such exception and the petitioner reserved an exception to such ruling of the court (R. 39).

4. That to set aside the orders of the Railroad Commission in granting the permits to him under the circumstances alleged where others had been granted permits under the same circumstances would constitute an unlawful discrimination against the defendant (R. 24).

The plaintiffs specially excepted to such allegations because (a) they were illegal, immaterial and prejudicial and a legal conclusion; (b) if defendant's permit is otherwise shown to be illegal, it could not be upheld on the ground that permits have been granted to others under a similar condition, as it would bring about complete destruction of the spacing rule; and (c) the defendant had an adequate remedy by filing suit (R. 35).

The trial court sustained such special exception and the petitioner reserved an exception to such ruling of the court (R. 39).

5. That his leasehold had been proven productive of oil and gas, and that under the settled law of the State of Texas, which constituted a rule of property at the time of the acquisition of the property by him, the owner of the leasehold had no right of ownership of oil and gas in place, but was bound by the rule of capture; that such was his vested right and unless the permits at issue were granted to him, oil would be drained from beneath his property by wells of adjacent leaseholders, and that without the wells, he could not exercise the rule of capture, which was his only property right and would, thereby, have his property taken without due process of law and be denied the equal protection of the laws guaranteed him by the Constitution (R. 25).

The plaintiffs directed a special exception to such allegations on the basis that such allegations were but the legal conclusions of the pleader and were irrelevant, immaterial and prejudicial (R. 35).

The trial court sustained such exception and the petitioner reserved an exception to such ruling of the court (R. 39).

The trial was to a jury. At the conclusion of the presentment of evidence, the trial court withdrew the case from the jury and entered judgment for the petitioners (R. 39). The petitioner duly excepted to such action and judgment of the court (R. 40).

An appeal from said judgment was taken by the petitioner to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, which affirmed the judgment. Volume 182, S. W. (2d Series) page 368. The Supreme Court of Texas refused writ of error, application for which was timely presented by the petitioner as a matter of right under Texas law. The judgment became final upon the overruling of petitioner's motion for rehearing by the Supreme Court of Texas on the 20th day of December, 1944. The whole record is before the court on this application which is made and filed within the time limits prescribed by law and the rules of this court.

The principal questions involved on said appeal were the actions of the trial court in sustaining the exceptions to petitioner's answer (1 through 5, ante).

II

Reasons Relied On for the Allowance of the Writ

1. The said Court of Civil Appeals decided the federal question of substance as to an unjust discrimination, denial of equal protection of the laws and a taking of property without due process contrary to the rights granted by the U. S. Constitution in favor of the respondents herein by holding that the petitioner should not be allowed to present evidence that a vast number of permits in exception to Rule 37 had been granted in the East Texas field upon the ground and reason that such permits would respectively increase the ultimate recovery of oil solely by reason of the fact

that the more wells that are drilled the greater will be the recovery of oil from such field; that such wells are now operating and will continue to so do during the producing life of said field; that the field had been developed upon such theory; and that to deny defendant the same right would amount to an unjust discrimination, denial of equal protection of the laws and a taking of his property without due process, which decision is not in accord with the decisions of this court, including the cases of *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. ed. 254; *Rogers* v. *State of Alabama*, 192 U. S. 226, 48 L. ed. 417.

2. The said Court of Civil Appeals decided the federal question of substance as to an unjust discrimination of the petitioner contrary to the rights granted by the U. S. Constitution in favor of the respondents by holding that the petitioner should not be allowed to present evidence that the Railroad Commission of Texas had, prior to the time of the granting of the permits to petitioner, granted numerous permits in the East Texas Oil Field to other persons similarly situated in petitioner, where all of the factors and conditions surrounding the granting of such permits were the same as surrounded petitioner and his property on which the permits in question were granted, and to set aside the orders of the Railroad Commission in granting the permits to him under the circumstances alleged where others had been granted permits under the same circumstances would constitute an unlawful discrimination against the petitioner, which decision is not in accord with the decisions of this court, including the cases of *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. ed. 254; *Rogers* v. *State of Alabama*, 192 U. S. 226, 48 L. ed. 417.

3. The said Court of Civil Appeals decided the federal question of substance as to an unjust discrimination of the petitioner contrary to the rights granted by the U. S. Con-

stitution in favor of the respondents by holding that the petitioner should not be allowed to present evidence that his leasehold had been proven productive of oil and gas, and that under the settled law of the State of Texas, which constituted a rule of property at the time of the acquisition of the property by him, the owner of the leasehold had no right of ownership of oil and gas in place, but was bound by the rule of capture; that such was his vested right and unless the permits at issue were granted to him, oil would be drained from beneath his property by wells of adjacent leaseholders, and that without the wells, he could not exercise the rule of capture, which was his only property right and would, thereby, have his property taken without due process of law and be denied the equal protection of the laws guaranteed him by the Constitution, which decision is not in accord with the decisions of this court, including the cases of *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. ed. 254; *Rogers* v. *State of Alabama*, 192 U. S. 226, 48 L. ed. 417.

4. The said Court of Civil Appeals decided the federal question of substance as to an unjust discrimination of the petitioner contrary to the rights granted by the U. S. Constitution in favor of the respondents by holding that the petitioner should not be allowed to present evidence that the Railroad Commission of Texas is the agency charged by law with the duty of administration of Rule 37, and that such agency in the administration of such rule had construed same as permitting an exception to be granted under the terms of such rule to applicants upon a showing of a prevention of waste by the increasing of the ultimate recovery of oil from the drilling and production of such well; that this amounted to a practical construction of the rule and such practical construction was plead in bar to the suit, which decision is not in accord with the decisions of this court, including the cases of *Truax* v. *Corrigan*, 257

U. S. 312, 66 L. ed. 254; *Rogers* v. *State of Alabama*, 192 U. S. 226, 48 L. ed. 417.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Court of Civil Appeals had in the case numbered and entitled on its docket, No. 9459, *W. W. Hinchliffe, Appellant* v. *The Texas Company et al., Appellees*, to the end that this cause may be reviewed and determined by this court as provided by the statutes of the United States; and that the judgment herein of said Court of Civil Appeals be reversed by the court, and for such further relief as to this court may seem proper.

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TOMAS G. POLLARD,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1061

W. W. HINCHLIFFE,
Petitioner and Appellant Below,

vs.

THE TEXAS COMPANY, OHIO OIL COMPANY, AMERADA PETROLEUM CORPORATION, DEEP ROCK OIL CORPORATION,
Respondents and Appellees Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

The opinion in the Court of Civil Appeals is reported in Volume 182, 2d Series, Southwestern Reporter, page 368.

II

Jurisdiction

1. The date of the decree to be reviewed is July 26, 1944 (182 S. W. 2d 368), being the decree of the Court of Civil

Appeals affirming the judgment of the trial court dated April 14, 1944 (R. 37). Such decree did not become final until December 20, 1944, upon the overruling of petitioner's motion for rehearing by the Supreme Court of Texas. This application is presented within 90 days from the time the decree became final.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237, (b), Judicial Code, Article 344, (b), Title 28, United States Code, annotated.

3. The Railroad Commission of Texas is charged by law with the duty of conserving the oil and gas of Texas, having authority to pass rules and regulations to such end and to administer them. Article 6029, R. C. S. of Texas. Pursuant thereto it passed the following rule effective at the time at issue herein:

> "It Is Hereby Ordered By the Railroad Commission of Texas that Rule No. 1 of Sub-division II (Drilling) of Division 3, being special rules governing the East Texas field, is hereby amended so that same shall hereafter read as follows:
>
> "*Rule 1. Spacing Rule.* No well for oil or gas shall hereafter be drilled in said East Texas field nearer than 660 feet to any other completed or drilling wells on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line or subdivision line; provided that the Commission in order to prevent waste, or to prevent the confiscation of property, will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired, application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied

by a plat drawn to the scale of one inch equalling four hundred (400) feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling or permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that the facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten (10) day's notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect the property belonging to applicant from confiscation.

"Provided Further That the Railroad Commission of Texas, in order to prevent waste or to prevent the confiscation of property, may upon its own motion or order, issue or grant permit or permits for the drilling of any well or wells for oil or gas nearer than 660 feet to any other completed or drilling well on the same or adjacent tract of land or farm and nearer than 330 feet to any property line, lease line or subdivision line as hereinbefore prescribed whenever the Commission shall determine that the drilling of any such well or wells is necessary to prevent waste or to prevent the confiscation of property. When in the opinion or judgment of the Commission waste or confiscation of property is reasonably eminent or is taking place on any leasehold, the Commission may, on its own initiative or motion, order a hearing for the purpose of determining whether such waste or confiscation of property is taking place. Such permit or permits shall be issued or granted only after at least ten (10) day's notice to the owners of said leasehold and

to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard and after the Commission has determined that the drilling of any well or wells for oil or gas is necessary either to prevent waste or to protect the owners of said leasehold from confiscation.

"No well drilled in violation of this rule without special permit obtained issued or granted in the manner prescribed in said rule, and no well drilled under such a special permit or on the Commission's own order which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas, and any such well so drilled in violation of said rule or in violation of a permit granted as a special exception to said rule or on the Commission's own order shall be plugged.

"The order entered by this Commission on August 30, 1933, commonly designated as the direct and equidistant offset order is hereby rescinded, annulled and shall be of no further force and effect. All other rules, regulations and orders of this Commission which conflict with the terms and provisions of Rule No. 1 as hereby amended and promulgated are hereby declared to have no further application to wells in said East Texas field to the extent of such conflict.

"In the adoption and promulgation of this order, it is here declared that the Commission intends to adopt each phrase, sentence, and paragraph separately and independently of each other such phrase, sentence, and paragraph, and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion" (R. 5-7).

Petitioner applied for permits to drill two wells as required by the terms of the aforesaid rule. After a hearing the Railroad Commission granted such permits to the petitioner. The respondents brought this action to set

aside such permits and enjoin petitioner's drilling and production of the wells so permitted. The respondents alleged the action of the Railroad Commission in granting such permits to be null and void.

The petitioner (defendant in the trial court) joined issue as to this and among other defenses asserted the action of the Railroad Commission was valid because

> (a) "Said defendant would further show that the Railroad Commission of Texas has heretofore, since the promulgation of such Rule 37 as regards the East Texas Oil Field, granted a vast number of permits in exception to said Rule 37 in the East Texas Oil Field, upon the ground and reason that such permits would respectively increase the ultimate recovery of oil in the East Texas Oil Field, and that such ultimate recovery would be increased solely by reason of the fact that the more wells that are drilled, the greater will be the recovery of oil from such field. That such wells so permitted by the Railroad Commission of Texas are now operating and producing oil and gas from the East Texas Oil Field, and will continue to so do during the producing life of said field. That said East Texas Oil Field has been developed by the drilling of oil and gas producing wells therein upon such theory; that said field has been developed upon such theory up to the present time, which is when said field has reached its peak of development and of enforcing the spacing provisions of such purported Rule 37 at this time would amount to an unlawful discrimination, a denial of the equal protection of law, a rank injustice, and result in such inequities as would shock the judicial conscience of this Court and amount to unjust discrimination in the taking of the property of these defendants without due compensation thereof, and an invasion of their rights and property without due process of law, contrary to the terms and provisions of the Constitution of the United States of America, particularly the Fourteenth Amendment thereto, and of the

Constitution of the State of Texas, which are here and now expressly plead in bar of the action of said Plaintiff and Intervenor" (R. 23-24).

(b) "This defendant would further show that the Railroad Commisson of Texas, the agency charged by law with the duty of administration of such Rule 37, has heretofore and had, prior to the time of granting of the permits in question herein to this defendant, granted numerous permits in the East Texas Oil Field to other persons and lease holders similarly situated to this defendant where all of the factors and conditions surrounding the granting of such permits by the Railroad Commission of Texas were the same as surrounded this defendant and his property on which the permits in question were granted. That such permits so granted to others by the said Railroad Commission were not contested or appealed from by these plaintiffs' and wells were drilled under such permits and have been producing oil from the common East Texas Oil Field in which this defendant's property is located and are now and will continue for many years in the future to recover and produce oil from said common East Texas Oil Field. That by reason thereof to set aside the orders of the Railroad Commission of Texas in granting the permits in question to this defendant would constitute an unlawful and unjust discrimination in favor of others similarly situated to this defendant and against this defendant and deny this defendant the equal protection of the laws and deprive him of his property without due process of law as are vouchsafed to him by the Constitution of the United States of America and particularly the Fourteenth Amendment thereof and as vouchsafed by the Constitution of the State of Texas" (R. 24).

(c) "This defendant would further show that he is the owner of the oil, gas and mining lease upon the tract of land described in the permits under attack herein. That said land and premises have been proved of being productive of oil and gas and that there are

oil and gas wells situated on all sides of said property from which there is now being produced oil and gas and which was being produced at all times in controversy herein. That under the settled law of the State of Texas, which was a rule of property at the time of the acquisition of such property by this defendant and is presently a rule of property under the laws of the State of Texas, the owner of the land which was and is underlain by oil and gas, such as the property of the defendant in issue herein, had no right of ownership of such oil and gas in place but the rule of capture obtained and the owner of such property, as the defendant in this case, had the duty as well as the right in and to said property by the drilling of wells on his property. Such was the right of such owner and is the right of this defendant to protect the vested interest he has and holds in and to said property, to protect his property and property rights by the drilling of the wells at issue herein. That unless such permits are granted to this defendant, oil will be drained from beneath his property by the wells of adjacent lease holders and on adjacent tracts and by other wells in the East Texas Oil Field, and by reason thereof the deprivation of the wells at issue herein would constitute a taking of this defendant's property without due process of law and deny to him the equal protection of the laws as guaranteed to him by the Constitution of the United States of America and particularly the Fourteenth Amendment thereof and contrary to the laws and Constitution of the State of Texas" (R. 25).

(d) "That the Railroad Commission of Texas is the agency charged by law with the duty of administration and carrying into effect of such Rule 37 relied upon by the plaintiff and Intervenor herein, as the basis of their action. That such agency has by its acts and actions in the administration of such rule, heretofore construed same as permitting exceptions to be granted to applicants upon a showing of a prevention of waste by the increasing of the ultimate recovery of oil by

the drilling of such well, whether such greater ultimate recovery was by the fact that the more wells that are drilled, the more oil will be obtained, or by the other reason. That by their acts and conduct heretofore in the administration of such rule, the Railroad Commission of Texas has given a practical construction to such rule so as to grant exceptions upon a showing of a greater ultimate recovery by reason of the drilling of such well, regardless of the source from which such greater ultimate recovery was obtained. These defendants here and now expressly plead such practical construction of such rule in bar of the action of this Plaintiff and Intervenor, and would show that the well for which permit was granted by the Railroad Commission at issue herein, will increase the greater ultimate recovery of oil from the East Texas Oil Field than would obtain if such well is not permitted" (R. 22-23).

The petitioner, by such pleading, timely presented his rights to these defenses as guaranteed by the Federal Constitution, asserting thereby in the trial court at his first opportunity, that by permits being granted to others where the same or similar conditions prevailed, an unjust discrimination and unequal protection of the law, lack of due process and taking of his property would result if the relief sought by respondents was granted, because petitioner would be deprived of the same rights to permits as had been accorded to others, unless the action of the Railroad Commission granting him such similar rights and permits was upheld.

The respondents directed special exceptions to these defensive matters alleged by the petitioner. To the allegations set out above in (a), the defendant excepted as follows:

"Plaintiffs specially except to paragraph X of said answer asserting that permits have been granted to

others in the field solely on more wells, more oil testimony, and to deprive defendant of permits so granted would be confiscation and discriminatory, on each of the following separate grounds:

"(a) If defendant is affected by the permits granted to others on such basis he had an adequate remedy of filing suit to cancel same, and such allegations are irrelevant, immaterial and prejudicial.

"(b) Defendant cannot, on such basis, obtain an invalid permit from the Commission and insist that it be upheld by the courts, because such would be equally applicable to all other operators in the field, and would bring about complete destruction of the spacing rule and its usefulness as a conservation measure" (R. 34).

To the allegations the petitioner set out above in (b), respondents excepted as follows:

"Plaintiffs specially except to paragraph XI wherein it is alleged that permits have been granted to other operators similarly situated to defendant where all factors and conditions surrounding the granting of permit were the same as surrounded defendant and his property, because said allegation is irrelevant, immaterial and prejudicial, and is but the legal conclusion of the pleader, no facts being alleged upon which it can be adjudged whether the factors and conditions were all the same; and said allegation is vague and indefinite in that it does not name the other permittees or identify their leases, well numbers or Rule 37 permit numbers, and is too vague and indefinite to apprise plaintiffs of the permits which defendant contends were granted under the same conditions, nor are the conditions referred to by defendant described so that the Court and plaintiffs may know which surrounding conditions defendant refers to, so as to enable plaintiffs to investigate and be prepared to meet the issue of proof whether or not such conditions are in fact the same as exist in defendant's lease."

"4. Plaintiffs specially except to the allegation in Paragraph XI that plaintiffs did not contest or appeal from permits granted to other persons and leaseholders situated similarly because said allegation is irrelevant, immaterial and prejudicial."

"5. Plaintiffs specially except to the allegations in the Paragraph XI that to set aside the permits involved in this suit would be discriminatory and confiscatory as to defendant because the Commission had previously granted permits to other operators under the same surrounding conditions, on the following grounds, separately urged:

"(a) Said allegation is irrelevant, immaterial and prejudicial, and is merely the legal conclusion of the pleader.

"(b) If defendant's permit is otherwise shown to be illegal, it could not be upheld on the ground that permits have been granted to others under similar conditions, because if that conferred a legal right to the permit, then all other operators in the field would be entitled to obtain and have the courts uphold illegal permits under the same or similar surrounding conditions, which would bring about complete destruction of the spacing rule under which the permit in controversy was granted as an exception.

"(c) If defendant was affected by such permits granted to others he had an adequate remedy by filing suit to cancel same" (R. 33-34).

To petitioner's defenses as alleged in (c) above, the respondents directed the following special exceptions:

"Plaintiffs specially except to the allegation in Paragraph XII to the effect that under the settled law defendant had no right of ownership in the oil and gas in place and only the rule of capture obtained, and that by virtue thereof defendant had the right to drill the wells in controversy, because said allegations are but the legal conclusions of the pleader and are irrelevant, immaterial and prejudicial" (R. 35).

To petitioner's defense as alleged in (d) above, the respondents directed the following special exceptions:

> "1. Plaintiffs specially except to paragraph IX of said answer wherein defendant pleads a 'practical construction' of Rule 37 as authorizing granting of permits on the 'more wells, more oil' theory, on the following grounds, each separately urged:
>
> "(a) Said allegations are irrelevant and immaterial; and prejudicial.
>
> "(b) Said allegations are inconsistent with this allegation that said rule is invalid, and defendant may not attack the rule and at the same time construe it" (R. 33).

The trial court sustained these exceptions of the respondent, to which actions of the court the petitioner duly reserved an exception (R. 39).

These special exceptions went to the merits of the petitioner's rights and defenses in that they were based on the immateriality and irrelevancy of such matters raised by the allegations as defenses. Thus, we have presented the clear issue of whether the facts of actions and treatment of others similarly situated may be shown as a defense. Petitioner says it is permissible; otherwise, the courts of a state are given the right by their actions to deprive a citizen of the equal protection of law, due process of law and protection of property guaranteed by the Constitution of the United States. The action of the trial court deprived the petitioner of showing these defenses. Being thus deprived, judgment was rendered by the trial court declaring the permits granted by the Railroad Commission unto this petitioner to be void. Since for the purposes of the exceptions the allegations must be considered as true, the entry of such judgment is tantamount to a holding that although it is true that the Railroad Commission, as the agency charged

by law with the duty of administering such Rule 37, has heretofore construed same as allowing a permit upon a showing of an increasing of ultimate recovery thereby, such facts are immaterial and the action of the Railroad Commission granting this petitioner the same rights as consistently granted to others by the Railroad Commission was void; that although the Railroad Commission permitted the development of the East Texas Oil Fields from time of discovery to present date by allowing permits in exception to Rule 37 upon the basis that such permits would prevent waste by increasing the ultimate recovery of oil, and that vast numbers of such permits have been previously allowed to other persons the petitioner should not be heard to claim the same right, and the action of the Railroad Commission granting petitioner the same right was void; that although the Railroad Commission had prior to the granting of petitioner's permits granted numerous permits to other persons where all the factors and conditions surrounding the granting of such permits were the same as surrounding the petitioner and his property when the permits hereunder attacked were granted, such are immaterial and irrelevant, and despite them the order of the Railroad Commission granting such similar rights and treatment to the petitioner was void; that although the petitioner is the owner of oil-producing property in a state where the rule of capture is the settled property law, he cannot be heard to assert such right to prevent the drainage and confiscation of his property which was then obtaining by wells of adjacent leaseholders, and the order of the Railroad Commission granting him such right was void.

The petitioner properly reserved exception to the action of the trial court in sustaining the respondents' exceptions to petitioner's defensive matter aforesaid (R. 39) and appealed from the judgment herein to the Court of Civil Appeals of the Third Supreme Judicial District of

Texas, at Austin, and there urged the errors here complained of. Said Court of Civil Appeals affirmed the judgment of the trial court. Petitioner in due season filed motion for rehearing to the Court of Civil Appeals, petition for writ of error to the Supreme Court of Texas, and motion for rehearing thereon, in each of which the errors here complained of have been assigned and urged. Petitioner asserts and contends that his constitutional rights have been flagrantly disregarded in this case, and in the language of this Honorable Court, the courts have flouted the basic principle that all people must stand on an equality before the bar of justice of every American court. *Chambers* v. *State of Florida*, 309 U. S. 227, 241, 84 L. ed. 716, 724.

4. The cases believed to sustain such said jurisdiction are as follows: *Truax* v. *Corrigan*, 257 U. S. 312, 66 Lawyers Edition, 254; *Rogers* v. *State of Alabama*, 192 U. S. 226, 48 Lawyers Edition, 417.

III

Statement of the Case

This has already been stated under Section I of the preceding petition (pp. 1-5) and under the preceding Section II, subsection 3, of this brief (pp. 10-21), which are hereby adopted and made a part hereof.

IV

Specification of Errors

1. The said Court of Civil Appeals erred in holding that the action of the trial court in sustaining respondents' exceptions to the allegations contained in paragraph IX of petitioner's Second Amended Original Answer was proper.

2. The said Court of Civil Appeals erred in holding that the action of the trial court in sustaining respondents' ex-

ceptions to the allegations contained in paragraph X of petitioner's Second Amended Original Answer was proper.

3. The said Court of Civil Appeals erred in holding that the action of the trial court in sustaining respondents' exceptions to the allegations contained in paragraph XI of petitioner's Second Amended Original Answer was proper.

4. The said Court of Civil Appeals erred in holding that the action of the trial court in sustaining respondents' exceptions to the allegations contained in paragraph XII of petitioner's Second Amended Original Answer was proper.

V

ARGUMENT

Summary of the Argument

Point A. Where an administrative agency charged by law with the duty of administering a rule has in such administration given a practical construction thereto, all persons subject to such rule are entitled to the benefit of such practical construction and the deprival of such right by the action of a state court infringes upon the right of equal protection of the law guaranteed by the United States Constitution.

Point B. Where an administrative agency has granted permits for the drilling of oil wells to other persons where all the factors and conditions were the same as surrounded the granting of permits to another person, the deprival of the latter by action of a state court of the right to show such facts in defense of his permits denies him the equal protection of the law guaranteed by the United States Constitution.

Point C. Where an administrative agency had granted numerous permits in a particular oil field under its rule allowing such permits when shown necessary to prevent waste upon a showing of a prevention of waste by increasing the ultimate recovery of oil by the granting of the wells sought by such permits, and permitted the development of such field under such theory up to the time of a subsequent application for a permit in such field, the action of a state court in denying the applicant the right to show such conditions in support of his permits destroyed his right to the equal protection of law guaranteed by the United States Constitution.

Point D. Where under the settled law of a state the rule of capture is the rule of property, the action of a state court denying the right to a leaseholder to prevent the drainage and confiscation of his property by the drilling of wells, which was his only available means under the law, denied such leaseholder the equal protection of law guaranteed by the United States Court and constituted a taking of his property without due process vouchsafed by the United States Constitution.

Point A

Where an administrative agency charged by law with the duty of administering a rule has in such administration given a practical construction thereto, all persons subject to such rule are entitled to the benefit of such practical construction and the deprival of such right by the action of a state court infringes upon the right of equal protection of the law guaranteed by the United States Constitution.

It is the law of Texas that an interpretation by the Railroad Commission of Texas of one of its rules is deemed to have become a part of the Rule. 34 Texas Jurisprudence, 708; *Texas and Santa Fe Railway Company* v. *H. G. and*

Fuel Company, 51 S. W. (2) 284; *W. T. Compress Company* v. *P. and S. F. Railway Company*, 15 S. W. (2) 558.

The petitioner alleged that the Railroad Commission of Texas had construed its Rule 37 (p. 12) as permitting a permit in exception to the spacing provisions of such rule upon a showing of a greater ultimate recovery by reason of the well for which permit was so sought. Since the error complained of was the sustaining of an exception to such allegations, they must for this argument be considered as true. Being true, the action of the court in denying the petitioner the right to present such facts in bar of respondents' action as plead by the petitioner, prevented him from obtaining at the hands of the court an equal application of the law contrary to the intendment of the Fourteenth Amendment to the United States Constitution. In discussing this intendment, this Court in its decision of the *Truax* v. *Corrigan* case, *supra*, said:

> "* * * the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class" (p. 263, 66 L. ed.).

Again in the same case:

> "It is beside the point to say that plaintiffs had no vested right in equity relief, and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause, which forbids the granting of equitable

relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction. The Fourteenth Amendment, as this court said in Barbier v. Connolly, already cited, intended 'not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts:* that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one [335] than are laid upon others in the same calling and condition, and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses' " (p. 263-4, 66 L. ed.).

This court has consistently held that it will take jurisdiction and grant relief to persons deprived of equal protection of the law whether occurring through an act of the legislature, a decision of the courts or through the acts of an executive or administrative officer of the state. *Rogers v. State of Alabama*, 192 U. S. 226, 48 L. ed. 47; *Carter v. State of Texas*, 177 U. S. 442, 44 L. ed. 839.

Point B

Where an administrative agency has granted permits for the drilling of oil wells to other persons where all the factors and conditions were the same as surrounded the granting of permits to another person, the deprival of the latter by

action of a state court of the right to show such facts in defense of his permits denies him the equal protection of the law guaranteed by the United States Constitution.

The petitioner alleged that the Railroad Commission has, heretofore, and prior to the time of granting the permits in question to petitioner, granted numerous permits to other persons similarly situated to petitioner where all of the factors and conditions surrounding the granting of such permits were the same as surrounded the petitioner and his property on which the permits in question were granted. That such permits so granted to others were not contested or appealed from by the respondents and wells were drilled under such permits and have been producing oil from the common East Texas Oil Field in which the petitioner's property is located, and such wells are now and will continue for many years in the future to recover and produce oil from said common East Texas Oil Field. If true, as they must be considered under this record, petitioner showed a condition which under an equal application of the law entitled him to the permits in question; otherwise, persons similarly situated would enjoy rights he was not accorded. The Railroad Commission of Texas recognized this and granted him the permits just as it had done for the others. Although they had not done so with the others, the respondents appealed the Railroad Commission order to the state court. When the petitioner asserted his equal rights under the law to that accorded others identically situated, the state court by its ruling in response to respondents' exceptions held that petitioner could not be heard to urge such equality of right. By this ruling, petitioner was adjudged to have no right to the permits granted him by the Railroad Commission while others similarly situated continued to enjoy their permits granted under identical factual situations.

The petitioner insists that this constitutes an unjust discrimination and a denial of equal protection of law contrary to the United States Constitution, and that under the decisions of this court, including those cited under Point A, this court should grant the relief he seeks herein and accord him the same rights others similarly situated are enjoying.

Point C

Where an administrative agency had granted numerous permits in a particular oil field under its rule allowing such permits, when shown necessary to prevent waste, upon a showing of a prevention of waste by increasing the ultimate recovery of oil by the granting of the wells sought by such permits, and permitted the development of such field under such theory up to the time of a subsequent application for a permit in such field, the action of a state court in denying the applicant the right to show such conditions in support of his permits destroyed his right to the equal protection of law guaranteed by the United States Constitution.

The petitioner alleged that the Railroad Commission, the body authorized by law to conserve oil and gas in Texas, had promulgated its Rule 37. That such rule provided for permits to be granted in exception to such rule where necessary to prevent "waste." That prior to petitioner's application, the Railroad Commission had granted a vast number of permits in the field where petitioner's property was located upon the ground that such permits would respectively increase the ultimate recovery of oil solely because of the fact that the more wells that are drilled in the East Texas field, the greater will be the recovery of oil from such field. In other words, under the conditions affecting production in the East Texas field, more oil will be recovered by increasing the density of drilling through de-

creasing energy use in producing from shorter distances, equalizing low pressure areas, etc., than would be lost through channeling and coning of water, etc., incurred in the increased density of wells. That the field had been developed on that theory and the numerous wells granted under such theory were now operating and producing and would so continue during the life of such field. That to deny petitioner his permits under such facts would amount to an unjust discrimination and a denial of the equal protection of law and a taking of his property without due process contrary to the United States Constitution.

The respondents excepted to these allegations on the grounds that (a) the petitioner had an adequate remedy by filing suit to cancel the other permits; (b) the allegations were irrelevant, immaterial and prejudicial; and (c) that to grant permits to petitioner because of such facts, would destroy the spacing rule and its usefulness as a conservation measure.

The trial court sustained these exceptions thereby taking from petitioner his right to assert these alleged facts as a bar and defense to the action of the respondents. The decree of the Court of Civil Appeals upheld the action of the trial court.

We think it needs no argument to assert that an allegation asserting a course of dealing or facts, whereby persons similarly situated are being accorded unequal protection of the law, is relevant and material as a defense.

As to the petitioner having an adequate remedy by cancellation suits against the thousands of wells heretofore permitted on the alleged facts, the Texas Supreme Court and the Federal Circuit Court of this circuit have for years been upholding permits granted on similar facts and pronouncing it as a valid theory and legal basis for permits granted under the "waste" exception of Rule 37.

Gulf Land Co. vs. *Atlantic Refining Co.*, 113 Fed.(2d) 902, 905; *Stanolind Oil & Gas Co.* vs. *Ambrose*, 118 Fed. (2d) 847.

It was conceded as the law until the decision of the Texas Supreme Court in the case of *Railroad Commission v. Shell Oil Company*, 161 S. W. (2d) 1022, known as the Trem Carr decision.

The Trem Carr decision was not pronounced until after this permit was granted, and the respondents' suit against the petitioner had been pending for some considerable time theretofore. How far would the petitioner have gotten in canceling the several thousand waste permits outstanding under such conditions? Certainly this could not be called an adequate remedy. Was the petitioner any more required to obtain cancellation of such permits than the respondents? The respondents had tried in numerous instances theretofore to void such permits without success. Why did they not secure cancellation at such time, if it is or was an adequate remedy to the petitioner?

To reach its conclusion in the *Trem Carr* case, the Texas Supreme Court reasoned that to uphold permits on the "more wells—more oil" theory, an unjust discrimination would ensue, and that an unjust discrimination would void Rule 37 and they must adopt a construction which would uphold the validity of the rule. Faced with this statement of the law for the first time after his permits had theretofore been allowed by the Railroad Commission and subjected to attack in this suit, the petitioner in defense of his permits in such suit alleges that the Railroad Commission, for many years in the East Texas Oil Field, has granted permits on the "more wells—more oil" theory; that such field has been drilled and developed on that theory up to the present time, its peak of development; that to change now the plan of development after the majority of the wells has been drilled and deny to this petitioner the

right, which under similar conditions has been granted to others, creates a rank and unjust discrimination. Is one unjust discrimination any more important than another? Can the Texas Supreme Court construe Rule 37 so as to exclude an unjust discrimination and then refuse to relieve the petitioner from an unjust discrimination imposed by such construction? If an unjust discrimination results and it must be considered in the state of this record that it does obtain, since the petitioner has alleged that to be the fact and his allegations must be considered as true, can his defense of unjust discrimination be stricken because to prevent his unjust discrimination would result in the voiding of some particular rule or regulation? Why is not the quotation made by the Texas Supreme Court in the *Trem Carr* case from the opinion of this Honorable Court in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 56, 30 L. ed. 220, equally applicable to the petitioner's situation herein?

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

POINT D

Where under the settled law of a state the rule of capture is the rule of property, the action of a state court denying the right to a leaseholder to prevent the drainage and confiscation of his property by the drilling of wells, which was his only available means under the law, denied such leaseholder the equal protection of law guaranteed by the United States Constitution and constituted a taking of his property without due process vouchsafed by the United States Constitution.

The rule of capture as to the ownership of oil and gas has ever been, and still is, the law in Texas. It follows, that at the time of purchase of the property in controversy, the petitioner became vested with the right to capture all the oil possible through wells bored on his property.

> "and inasmuch as any owner has the right subject to the regulatory power of the State to take whatever he can find by drilling on his own premises, the owner of one tract may not complain if his neighbor sinks a well on the adjoining tract and drains the oil and gas from beneath both. 31 Tex. Jur. 527, and cases cited.

This right is inviolate save as it may be restricted by the police power of the sovereignty and by the duty to use his rights so as not to damage his neighbors. Rule 37 finds its validity in this police power. We do not by this proposition attack its validity. We do say that, having a vested right circumscribed by Rule 37, the petitioner should be entitled to the same treatment and right in the interpretation of the Rule as has been accorded others. Any other treatment would constitute an unjust discrimination and an unequal protection of the law contrary to the Constitution of Texas and the United States.

By his pleadings in this instance, the petition endeavored to prove what others similarly situated had enjoyed, having no greater or different rights than he. The Court struck out such pleadings, depriving the petitioner of his equal rights and protection under our laws.

The only exception urged by respondents to petitioner's allegations in this regard was that such allegations were but the legal conclusion of the pleader and irrelevant, immaterial and prejudicial. Upon this basis solely, the trial court struck out petitioner's allegations and deprived him of his rights thereby asserted.

The allegations were a statement of a legal right of the petitioner and not a statement of a legal conclusion of the

pleader in the sense of the exception. A statement of a legal right would necessarily entail the use of the law by which the right was comprehended. It was stated as a fact and not by way of conclusion of the pleader from a statement of facts. To uphold the ruling of the court on such point would destroy the assertion of a legal right as a fact of defense.

If such legal right existed, it was permissible for the petitioner to plead it in defense and it was not irrelevant, immaterial or prejudicial in the sense it was improper to his defense.

If the only limitation on petitioner's right to drill all the wells he considered necessary to enjoy the vested property right of capture of the oil under or passing under his property was Rule 37, as undoubtedly was the situation, to deny him such a right by interpreting the rule one way as to him, but differently as to others similarly situated, would result in an unequal enforcement of the law and permit his property to be drained and confiscated by such others as he alleged and which must for this argument be conceded true while he was rendered impotent to protect his property not by the law but by the erroneous and unfounded action of the court.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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Of Counsel.

(7145)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 1061

W. W. HINCHCLIFFE,

Petitioner

v.

THE TEXAS COMPANY, OHIO OIL COMPANY, AMERADA PETROLEUM CORPORATION, DEEP ROCK OIL CORPORATION,

Respondents

BRIEF OF THE TEXAS COMPANY, AMERADA PETROLEUM CORPORATION AND DEEP ROCK OIL CORPORATION OPPOSING PETITION FOR WRIT OF CERTIORARI

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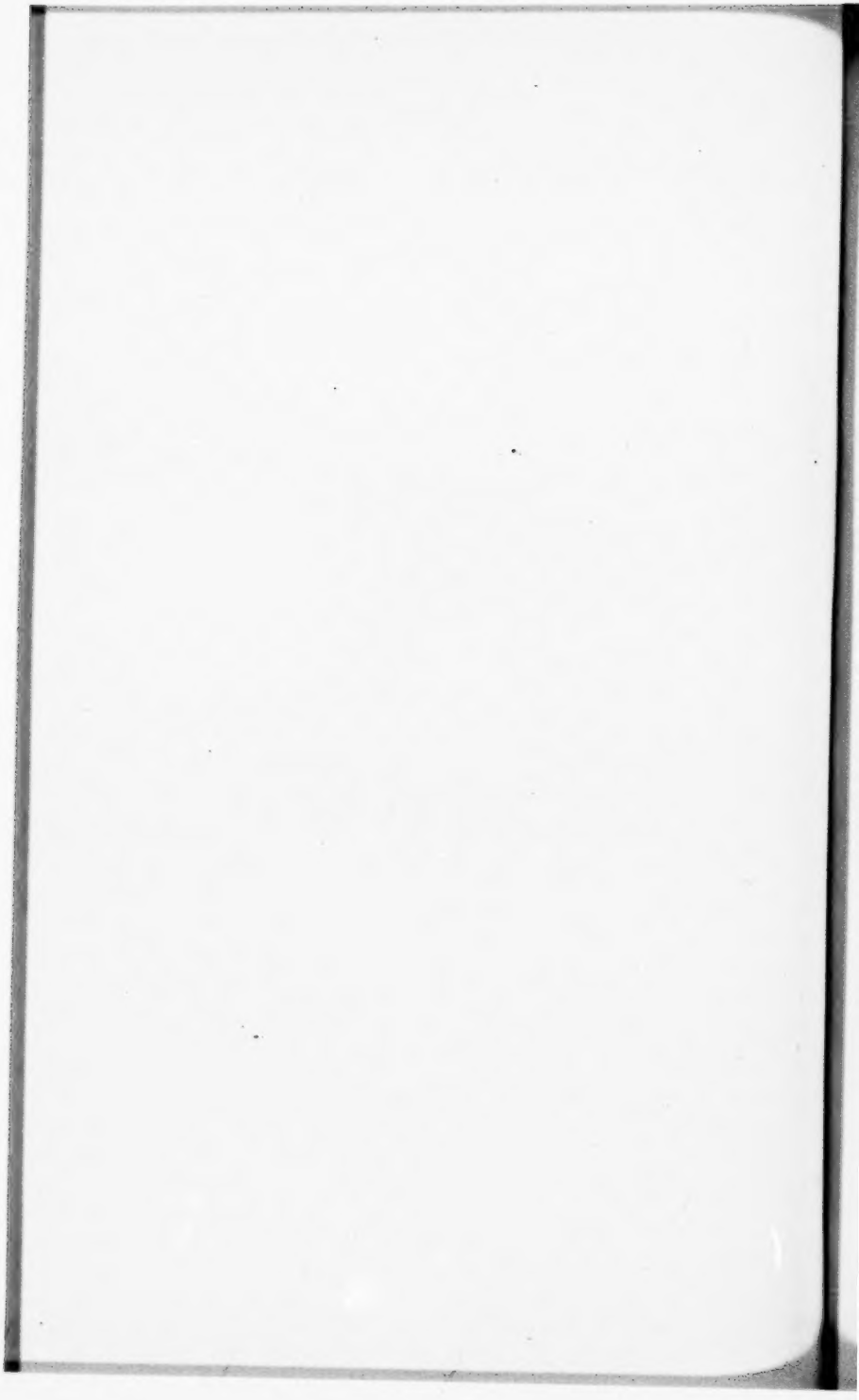

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W. W. HINCHCLIFFE,

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v.

THE TEXAS COMPANY, OHIO OIL COMPANY, AMERADA PETROLEUM CORPORATION, DEEP ROCK OIL CORPORATION,

Respondents

BRIEF OF THE TEXAS COMPANY, AMERADA PETROLEUM CORPORATION AND DEEP ROCK OIL CORPORATION OPPOSING PETITION FOR WRIT OF CERTIORARI

Respondents, The Texas Company, Amerada Petroleum Corporation and Deep Rock Oil Corporation are herein designated "plaintiffs" to distinguish

them from the other Respondent, Ohio Oil Company, who files a separate brief.

OPINION BELOW

Opinion of the Court of Civil Appeals, Third Supreme Judicial District of Texas, is reported in 182 S. W. (2d) 368. (R. 48)

JURISDICTION

The constitutional questions relied upon by Petitioner to sustain jurisdiction do not do so because they are not real or substantial questions and the decision thereof is not essential to the disposition of the case, for reasons hereinafter stated. *Patterson* v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 59 S. Ct. 259, 83 L. Ed. 231; *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751, and other decisions of this court collated in 36 *C. J. S.* 149-150.

STATEMENT OF THE CASE

The Texas Company, Amerada Petroleum Corporation and Deep Rock Oil Corporation as plaintiffs filed this suit in the District Court of Travis County, Texas, against W. W. Hinchliffe, the Railroad Commission of Texas, and its members, as defendants. (R. 1) The petition sought cancellation of an order of the Railroad Commission granting W. W. Hinchliffe a permit to drill well locations described as Nos. 3 and 4 on a 4.1-acre tract in Rusk

County, Texas, East Texas Field, and ancillary injunctive relief. (R. 13-14) The suit was filed pursuant to authority granted by Texas statute.[1]

Ohio Oil Company, as intervenor, filed a petition asserting the existence in itself of a right to sue to cancel the permit order, praying for cancellation and injunction. (R. 26)

Defendant Hinchliffe pleaded as against plaintiffs (R. 20, 26) *but not as against the intervenor* (R. 17, 38) certain special pleas (R. 22-26), to which said plaintiffs directed certain special exceptions (R. 33-36), which were sustained by the trial court. (R. 38-39) This is the particular ruling which the petition for writ of certiorari alleges as an infringement of Hinchliffe's rights under the Fourteenth Amendment, United States Constitution.

Respondent Ohio Oil Company, the intervenor, did not present exceptions to Hinchliffe's pleading and was not involved in that ruling; and such ruling, which is the basis of the petition for writ of certiorari, did not prevent Petitioner from pleading or proving such matters defensively to the suit of Ohio Oil Company.

The Railroad Commission's well spacing rule required wells to be spaced not less than 660 feet from other wells and not less than 330 feet from property lines, but provided for exceptions when necessary

[1]Article 6049c, Sec. 8, Appendix, p. 20.

"in order to prevent waste, or to prevent the confiscation of property." (R. 5) Both grounds of exception to this rule have a well defined legal meaning under the state law.[2] Petitioner, having two wells on his tract, sought and obtained from the Railroad Commission an order granting him a permit to drill additional wells Nos. 3 and 4, in exception to the fieldwide spacing rule. (R. 14-16) The order granting the permit recited that it was granted on both of the above-mentioned grounds of exception. (R. 14-16)

After trial on the merits according an independent judicial determination of facts from the evidence adduced in court (R. 39), the mode of trial provided by the state law,[3] the trial court awarded The Texas Company, Amerada, Deep Rock and Ohio Oil Company, *each independently of the other*, a judgment cancelling the permit order. (R. 39) Up-

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[2]Meaning of "necessity to prevent confiscation": *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 132 S. W. (2d) 254, 255; *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 85; *Trapp* v. *Atlantic Refining Co.*, 169 S. W. (2d) 797, 800, and other cases there cited.

Meaning of "necessity to prevent waste": *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1022; *Railroad Commission* v. *Marathon Oil Co.*, 89 S. W. (2d) 517, 519, writ of error refused; *Stanolind Oil & Gas Co.* v. *Marathon Oil Co.*, 123 S. W. (2d) 911, 914-916, writ of error dismissed; *Trapp* v. *Atlantic Refining Co.*, *supra*.

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[3]*Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1022.

on appeal from said judgment, the Court of Civil Appeals reviewed the transcript of evidence and determined that the evidence established as a matter of law that the permit was not necessary to be granted under either ground of exception to the rule, and was illegally granted; and it accordingly affirmed the trial court's judgment. (R. 48)

Petitioner does not now question the holding that under the state law his permit was illegally granted.

The petition for writ of certiorari asserts both as a basis for jurisdiction and as grounds for relief that Hinchliffe was entitled to plead and prove in bar of the plaintiff's suit certain alleged defenses hereinafter stated, and that the action of the state court in sustaining plaintiffs' special exceptions deprived him of his constitutional rights. If Petitioner were correct, we fail to understand how it could avail him because he did not plead such matters against the intervenor's suit, and revision of the ruling on the exceptions could not affect the judgment recovered by Ohio Oil Company in its own independent right. (See discussion, *infra*, p. 14).

The nature of the alleged defenses which he tried to assert against plaintiffs is stated in the argument, *infra*.

SUMMARY OF ARGUMENT

(1) The first and second of Petitioner's "Reasons Relied on for the Allowance of the Writ," while

presented as federal questions, are not real or substantial.

(2) The third and fourth of Petitioner's "Reasons Relied on for the Allowance of the Writ" involve questions of state law rather than federal questions.

(3) Decision of the alleged federal questions is not essential to the disposition of the case because (a) the rulings complained of do not pertain to the judgment recovered by Ohio Oil Company and (b) each of the rulings presented as federal questions are supported by non-federal grounds adequate to sustain the ruling.

ARGUMENT

I.

The first and second of Petitioner's "Reasons Relied on for the Allowance of the Writ," while presented as federal questions, are not real or substantial.

The first reason relied upon for allowance of the writ (petition, p. 5) is based upon the alleged error of the trial court in sustaining plaintiffs' exception to paragraph X of defendant Hinchliffe's answer (R. 23),and when the two are considered together, it will be perceived that Petitioner's contention is, in brief, that because numerous wells have been

permitted to be drilled under the Railroad Commission's alleged construction of the phrase "necessary to prevent waste," to enforce the spacing rule according to the settled construction thereof by the highest courts of the state would amount to an unlawful discrimination. In other words, Petitioner says he was entitled to prove that the Commission has granted numerous permits under an alleged construction which, if it exists, is contrary to the construction fixed by the decisions of the highest state courts; that because the Commission made mistaken rulings in the past and granted permits illegally Petitioner has a right in law to insist that they do so as to him.

The second reason relied upon by Petitioner for allowance of the writ (petition, p. 6) is based upon the alleged error of the trial court in sustaining plaintiffs' special exception to paragraph XI of defendant Hinchliffe's answer (R. 24), and when considered in connection therewith, the substance of the contention is that Petitioner should have been allowed to plead and prove that the Railroad Commission had previously granted numerous permits to others similarly situated which were not contested by suit to cancel, and under which producing wells have been drilled; hence, that it would discriminate against Petitioner if his illegal permits were set aside. In other words, Petitioner says that inasmuch as others who obtained illegal permits still have them, no one having sued to cancel them, the state courts should not cancel Petitioner's illegal

permits by due application and enforcement of the state laws.

Presumably, all governmental officers may at some time err in their application of the law, just as all courts, state and federal, make errors in the performance of their duties. We feel equally safe in presuming that most laws, state and federal, at some time have been violated, and that some offenders have not been called to account. There is never a perfect administration of justice.

When a mistake of law is made, to someone's advantage, those to whom the law is correctly applied do not receive equal treatment. But this is not discrimination.

If Petitioner were correct in his contention that a mistake in the administration of the law thereafter bars its correct administration, and that a failure to enforce a law as to one bars future enforcement as to others, then it is unlikely that any law could now be correctly administered or enforced.

In *Saunders* v. *Lowry*, (CCA 5) 58 F. (2d) 158, it is held that the fact that others equally guilty of violating the law were not prosecuted would not preclude (under the Fourteenth Amendment) punishment of another, also guilty. The mere failure to prosecute others is not a basis for federal intervention on the ground of denial of due process. *Buxbom* v. *City of Riverside*, 29 F. Supp. 3, 8, citing

Ah Sin v. *Wittman*, 198 U. S. 500, 25 S. Ct. 756; *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312; *Mackay Telegraph & Cable Co.* v. *City of Little Rock*, 250 U. S. 94, 39 S. Ct. 428.

In *People* v. *Montgomery*, (Cal.) 117 Pac. (2d) 437, 446-7, the court held that an instruction in a criminal prosecution to the effect that the violation of the law by others who were not prosecuted would not constitute a defense and should not be considered in reaching a verdict, did not violate the provisions of the Fourteenth Amendment. The court said:

> "... Appellant now in effect argues from this that equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons. While all persons accused of crime are to be treated on a basis of equality before the law, it does not follow that they are to be protected in the commission of crime. It would be unconscionable, for instance, to excuse a defendant guilty of murder because others have murdered with impunity. The remedy for unequal enforcement of the law in such instances does not lie in the exoneration of the guilty at the expense of society.... Protection of the law will be extended to all persons equally in the pursuit of their lawful occupations, but no person has the right to demand protection of the law in the commission of a crime...."

Any other rule would work unthinkable results.

Surely this does not present a substantial federal question.

Anyone who is interested and affected by an order of the Railroad Commission is authorized, by the very statute under which this suit was filed, to sue to annul it. Therefore, if Petitioner were interested in or affected by the permits which he asserts that the Commission granted to others under similar circumstances, he had his remedy, and the state courts presumably would have annulled such other permits on the same grounds applied to Petitioner. On the other hand, if he was not interested or affected by them, it would seem that they should have no bearing upon his constitutional rights.

The stricken pleadings did not state whether Petitioner was or was not affected by such other permits. But necessarily, either Petitioner was not affected by them or it was his own fault that he did not sue to annul them.

If there were any discrimination by the Railroad Commission it was in Petitioner's favor and against others similarly situated who were denied permits. The Supreme Court of Texas has held that the settled judicial construction of the exception clause "necessary to prevent waste" is required, not only by other provisions of the rule and the circumstances of its adoption, but also to prevent discriminatory administration of the rule by the Commission. *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1025.

However, Petitioner does not contend that the Railroad Commission discriminated *against* him. Nor does he contend that the State courts accorded him any different treatment or applied to him any different rule from that which the courts accord to or apply to others similarly situated.

II.

The third and fourth of Petitoner's "Reasons Relied on for the Allowance of the Writ" involve questions of state law rather than federal questions.

Petitioner's third reason for allowance of the writ (petition, pp. 6-7) is based upon the alleged error of the trial court in sustaining plaintiff's special exception to paragraph XII of defendant Hinchliffe's answer (R. 25), and when considered in connection therewith the substance is that Petitioner should have been allowed to plead and prove that his tract, which was proven productive property, was subject to the rule of capture as a rule of property under the laws of Texas, and that he had no right of ownership in place (note the pleading, R. 25); that under this rule he had a right to protect his property by drilling wells, and unless the wells at issue were permitted the oil in place beneath his tract would be drained by wells of others, in violation of his constitutional rights. (R. 25)

His allegation concerning the law of the state was not only a legal conclusion, and an erroneous

one,[4] but pertains to a question of state rather than federal law. The exception to paragraph XII of Hinchliffe's answer was addressed solely to his allegation of the law of the state, which was clearly unnecessary and improper in a jury case, and of course, that is the only allegation which was struck out by the ruling. The propriety of the ruling in striking this legal conclusion is purely a question of state law. All factual allegations in paragraph XII remained subject to proof. In fact, it was conceded that his tract was proven to be productive (R. 2, 29), and Hinchliffe attempted to establish that his existing wells were insufficient to prevent drainage, and offered testimony; but the Court of Civil Appeals upon reviewing it held the evidence established as a matter of law that his two existing wells were sufficient for that purpose. (R. 49-50) Petitioner does not now question this holding of the Court of Civil Appeals, which completely negatives his contention that his property is being taken in violation of the Constitution.

What Petitioner really seeks is assistance in confiscating oil of others; for inasmuch as his existing wells accord him his full share of the oil, to the same extent that Nos. 3 and 4 will enable him to produce still greater quantities by drainage from others, such others necessarily will be deprived of their share of the oil.

---

[4]Petitioner's Brief cites no authorities for his contention that ownership in place is not the law in Texas.

Petitioner's fourth and last reason for allowance of the writ (petition, p. 7) is based upon the alleged error of the trial court in sustaining plaintiff's special exception to paragraph IX of defendant Hinchliffe's answer (R. 22), and the substance of the contention is that plaintiffs should have been allowed to plead and prove that the Railroad Commission had construed the exception clause "necessary to prevent waste" contrary to the judicial construction thereof settled by decisions of the Texas Supreme Court and Courts of Civil Appeals (some of which are cited in footnote 2, p. 4, *supra*) rendered prior to the filing of such plea, and that he was entitled to show as a defense that under the Commission's alleged construction he was entitled to a permit.

Constitutional rights are not even mentioned in this paragraph of the pleading.

If there were such a conflict of constructions as Petitioner contends, what Rule 37 means and which of the two constructions should prevail is purely a question of state law. Even if the state courts had erred in their determination of such question it would not involve discrimination or confiscation in violation of the Fourteenth Amendment to the Constitution. The Texas courts have the final say concerning the meaning of Texas law. *Hotel & Res. Employees', etc.* v. *Wisconsin Employment Relations Board*, 315 U. S. 437, 62 S. Ct. 706, 708.

III.

Decision of the alleged federal questions is not essential to the disposition of the case.

(A) The Rulings Complained of do not Pertain to the Judgment Recovered by Ohio Oil Company

Intervenor Ohio Oil Company recovered judgment in its own right, independently of the plaintiffs' right. (R. 39) The alleged error upon which Petitioner relies for a writ was the ruling upon plaintiffs' exceptions, and in no wise affects the validity of the judgment recovered by Ohio Oil Company cancelling the permit order and enjoining further operations upon the involved locations.

So, what practical result is to be gained by Petitioner's rehearsing this court in the determination of the abstract question whether *plaintiffs' judgment* is erroneous because of the ruling upon *plaintiffs' exceptions* to the answer filed by Hinchliffe as defendant?

Clearly the decision of these questions could not affect the disposition of the case as to Ohio Oil Company; and when its judgment cancelling the permit is thus left undisturbed, the permit is none the less a dead issue, irrespective of whether plaintiffs also were entitled to judgment cancelling it.

For this reason there is a want of jurisdiction in this court. See authorities cited, *supra*, page 2.

(B) Each of the Rulings Presented as Federal Questions Are Supported by Non-Federal Grounds Adequate To Sustain the Ruling.

Paragraph X of the answer, involved in Petitioner's first reason for allowance of the writ, alleges that the Railroad Commission had granted numerous permits solely upon testimony advancing what has come to be known as the "more wells, more oil" theory, which wells have been drilled and are producing, and to enforce the spacing rule (according to the settled state judicial construction of the phrase "necessary to prevent waste") would be confiscatory and discriminatory. (R. 23-24)

The special exception thereto (R. 33-34) is based on two grounds: (a) if defendant were affected by such permits granted to others he possessed the adequate remedy of filing suit to cancel them, hence, the allegations were immaterial; (b) defendant having obtained an invalid permit cannot insist that it be upheld on such basis, because the same argument would be equally applicable to all other operators and would bring about a complete destruction of the spacing rule and its usefulness as a conservation measure.

Paragraph XI of the answer, involved in Petitioner's second reason for allowance of the writ, alleges that the Railroad Commission has previously granted numerous permits to others similarly situated which had not been contested by suits to cancel, and under which producing wells have been

drilled; hence, it would discriminate against Petitioner to cancel his permits (if found to be illegal under the state law). (R. 24) The special exceptions which were sustained to this paragraph were: (No. 3) because the allegations concerning permits granted to others similarly situated is immaterial, and a legal conclusion, no facts being alleged upon which it could be determined whether all the surrounding conditions were the same, and being vague and indefinite in failing to identify such other permits sufficiently to enable plaintiffs to investigate and be prepared to meet the issue with proof (R. 34); (No. 4) the allegation that *plaintiffs* had not filed suits contesting such other permits was immaterial (R. 34); (No. 5) the allegation that cancellation of Petitioner's permits would result in discrimination and confiscation for the reason asserted in said paragraph XI was improper because (a) immaterial, (b) if defendant's permits were shown to be illegal, they should not be upheld on the ground that similar illegal permits had been granted to others because that would result in complete destruction of the spacing rule under which the permit was granted as an exception, and (c) if Hinchliffe was affected by such permits of others he had an adequate remedy by suit to cancel them. (R. 35)

As stated in the opinion of the Court of Civil Appeals in this case, the same contentions had been made and overruled by the Texas courts in earlier cases. (R. 49)

When the court below held Petitioner's pleading

to be inadequate under the state practice from the pleading standpoint, he made no effort to supply the inadequacy by amendment.

As shown, *supra*, p. 10, if Petitioner were interested in or affected by the permits which he claims have been granted to others on the "more wells, more oil" theory, contrary to the settled judicial construction of the phrase "necessary to prevent waste," the state law gave him an adequate remedy by suit to cancel. Pursuit of such other remedy would not lead to the destruction of the spacing rule itself, which forms an essential part of the state conservation program. On the other hand, Petitioner's insistence that his illegal permits be sustained because other illegal permits have been granted and were not attacked, if recognized by the state courts as a defense in a case of this kind, would necessarily preclude all future attempts to enforce the conservation laws against holders of illegal permits, and the recognition of Petitioner's assertion that the permits were sustainable on the "more wells, more oil" theory would result in destruction of the very basis on which the legality of the spacing rule is founded. These grounds of exception represent well established state law, and we respectfully invite this court's consideration of the reasoning of the decisions cited in footnote 2, p. 4, *supra*, settling the state law on the point and presenting reasons of inescapable soundness supporting their conclusion. We especially call attention to the following language of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S. W.

(2d) 1022, 1026, 1027, which we quote for this court's convenience:

> "If, however, an exception to prevent waste may be granted on the basis of testimony that is equally applicable to any other field or part of a field subject to the rule—as in the case where the 'more wells, more oil' theory is relied upon—then there is actually no basis in fact for a distinction between cases subject to the general provisions of the rule and cases within the exceptions therein, and the Commission has no real guide or standard at all."
>
> * * *
>
> "If the Commission intended that all should be granted special permits upon request therefor, the general spacing provided for in Rule 37 was useless and should not have been adopted."

Petitioner's constitutional rights are not violated by his failure to amend inadequate pleadings or by the refusal of the state courts to permit him to pursue one course of protection which would result in disaster to the state conservation program, when he had another adequate remedy afforded by the state law which would not impair such program. The rulings which Petitioner presents as federal questions are clearly supported by adequate non-federal grounds.

CONCLUSION

We submit that the petition for writ of certiorari should be dismissed or denied.

If the court sees fit to grant it, we reserve the right to file a further brief on the merits before submission.

WHEREFORE, these Respondents pray that the petition for writ of certiorari be dismissed or denied.

Respectfully submitted,

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APPENDIX

Vernon's Texas Statutes, 1936.

Art. 6049c. *Oil and Gas Conservation. Sec.* 8. Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. (As amended Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, § 8; Acts 1935, 44th Leg., p. 180, ch. 76 § 14.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1061

W. W. HINCHLIFFE, *Petitioner*,

vs.

THE TEXAS COMPANY, THE OHIO OIL COMPANY, AMERADA PETROLEUM CORPORATION, DEEP ROCK OIL CORPORATION

BRIEF FOR RESPONDENT, THE OHIO OIL COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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W. W. HINCHLIFFE, *Petitioner*,

vs.

THE TEXAS COMPANY, THE OHIO OIL COMPANY, AMERADA PETROLEUM CORPORATION, DEEP ROCK OIL CORPORATION

BRIEF FOR RESPONDENT, THE OHIO OIL COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinion Below

The only court to write an opinion in this case was the Court of Civil Appeals for the Third Supreme Judicial District of Texas; its opinion is reported in 182 S. W. (2d) 368.

Jurisdiction

Petitioner claims jurisdiction under Judicial Code, Section 237(b); 28 U.S.C.A., Section 344(b). This respondent submits, as will appear from the follow-

ing Summary of the Argument, that no jurisdiction exists because no Federal question is presented by petitioner.

Statement of the Case

This litigation involves the validity of an order entered by the Railroad Commission of Texas allowing petitioner to drill two wells on his L. J. Pinkston lease in the East Texas oil field. The order was entered under the Commission's rule, known as Rule 37, regulating the spacing of wells in the field. The pertinent portion of the rule reads: "No well for oil or gas shall hereafter be drilled in said East Texas Field nearer than 660 feet to any other completed or drilling wells on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line or subdivision line; provided that the Commission in order to prevent waste, or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property" (R. 5).

Since the foregoing rule was promulgated many permits issued by the Commission under the exception clause of the rule authorizing their issuance "to prevent waste" have been attacked in the courts, and in many of these cases the owner of the permit has sought to sustain it by offering testimony that waste would be prevented by drilling the well in question

and by producing oil therefrom because the more wells that are drilled in the East Texas field, the greater will be the ultimate recovery of oil therefrom. This testimony has been relied on in so many cases that it has acquired a name; it is referred to by the courts as "more wells, more oil" testimony (R. 48).

The highest court of the State has held that a drilling permit issued "to prevent waste" cannot be sustained upon the basis of "more wells, more oil" testimony. The only authority given the Railroad Commission is to promulgate orders to prevent waste, which means that Rule 37, the spacing rule, must rest upon a finding of the Commission that it is, *generally speaking*, necessary to drill wells in the East Texas field 330 feet from lease lines and 660 feet from other wells in order to prevent waste. If this is the finding which supports the rule, "more wells, more oil" testimony constitutes an attack on the finding and hence an attack upon the rule itself. The highest court of the State has held, therefore, that a drilling permit issued "to prevent waste" can only be sustained upon the basis of evidence showing some unusual condition in the area where the well is to be drilled, a condition making the **general** finding of the Commission that wells should be drilled 330 feet from lease lines and 660 feet from other wells inapplicable. "More wells, more oil" testimony does not meet this test since that testimony is to the effect, not that unusual conditions exist in the area involved, but that it is necessary to drill the *entire* field to the greatest possible density in order to recover the greatest possible amount of oil therefrom. *Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 161 S. W.

(2d) 1022; see, also, opinion of the Court of Civil Appeals in the same case, reported at 154 S. W. (2d) 507; *Trapp v. Atlantic Refining Co.* (Tex. Civ. App.), 169 S. W. (2d) 797, writ of error refused. While there is some intimation in petitioner's brief, pp. 28-29, that the State law was to the contrary until quite recently, the truth is that the rule was first announced in *Railroad Commission v. Marathon Oil Co.* (Tex. Civ. App.), 89 S. W. (2d) 517, writ of error refused,* an opinion handed down long before petitioner sought the permits here involved.

This certiorari proceeding involves a claim by petitioner that he is entitled to sustain his permits upon the basis of "more wells, more oil" testimony; that to deny him such right denies him the equal protection of the laws, in violation of the Fourteenth Amendment.

Summary of the Argument

1. No Federal question is presented as to this respondent by petitioner's Points A, B, C, and D because no such question as to this respondent was raised below or decided below; and because no action of the trial court or of this respondent prevented petitioner from proving as against this respondent the matters which he now claims he should have been

*The refusal by the Supreme Court of Texas of an application for writ of eror amounts not only to an approval of the judgment of the Court of Civil Appeals but to an approval of that Court's opinion. Hamilton v. Empire Gas & Fuel Co., 134 Tex. 377, 110 S. W. (2d) 561; Humble Oil & Refining Co. v. State (Tex. Civ. App.), 158 S. W. (2d) 336, writ refused.

allowed to prove in the trial court. See pp. 6-10, *post.)*

2. No question of the equal protection of the laws or of due process of law is presented by petitioner's Points A, B, C, and D because petitioner does not complain of any action by the State or by any agency of the State. (See pp. 11-13, *post.*)

3. No Federal question is properly presented under petitioner's Points A, C, and D, because the matters relied upon by petitioner to raise such Federal question and pleaded by him in an attempt to raise such question are matters going to the very validity of the Railroad Commission's Rule 37, and consequently, under State law, are matters that must be presented in a suit brought as a direct attack upon Rule 37. Furthermore, petitioner, having obtained his permits to drill under the rule, is, under State law, estopped to contend in this proceeding that the rule is invalid. (See pp. 14-17, *post.*)

4. No Federal question of substance is presented by petitioner's Points A, B, C, and D because the court below found that petitioner has and will produce from his L. J. Pinkston lease without the wells, permits for which are involved in this litigation, all the oil he is entitled to produce therefrom under State law. (See pp. 17-19, *post.*)

5. No Federal question of substance is presented by petitioner's Points A, C, and D because the fact that others may have been granted drilling permits

in violation of law does not, by reason of the equal protection clause, entitle petitioner to sustain permits which are invalid under State law. (See pp. 19-20, *post.*)

6. No Federal question is presented by petitioner's Point B because the action of the courts below is, in so far as the question presented by said point is concerned, supported by a non-federal ground adequate to sustain it. (See pp. 20-22, *post.*)

First Point

No Federal question is presented as to this respondent by petitioner's Points A, B, C, and D because no such question as to this respondent was raised below or decided below; and because no action of the trial court or of this respondent prevented petitioner from proving as against this respondent the matters which he now claims he should have been allowed to prove in the trial court.

Argument

This suit was filed against petitioner and the Railroad Commission of Texas by respondents, The Texas Company, Amerada Petroleum Corporation and Deep Rock Oil Corporation, under Sec. 8, Art. 6049c, Vernon's Texas St. 1936, to cancel an order entered by the Commission allowing petitioner to drill two oil wells on his Pinkston lease (R. 1-14). This respondent intervened, assumed the status of a plaintiff and filed a petition alleging that the order

in question was invalid and praying for its cancellation and for an injunction prohibiting petitioner from exercising any right under it (R. 16, 26-33).

While this respondent is referred to in the pleadings as an "intervener" its rights are not derivative and it stands in the same position it would have occupied had it filed an independent suit. Since Sec. 8 of Art 6049c, Vernon's Texas St. 1936, gives any "interested person affected by . . . any . . . order made or promulgated by the Commission" the right to file a suit to test its validity, the State courts hold that a party intervening in a suit filed to test the validity of such an order cannot be prejudiced by the fact that he did not file an independent suit. *Trapp v. Atlantic Refining Co.* (Tex. Civ. App.), 170 S. W. (2d) 506, 510, writ refused. Consequently the proceeding in the trial court in reality involved two suits that had been consolidated for trial; one suit filed by this respondent, and the other suit filed by the other respondents. The trial court recognized this by entering judgment in favor of each respondent; its judgment provides that respondents "should *each* have judgment as prayed for" (R. 39).

In reply to the pleadings of this respondent petitioner filed what he designated "First Amended Answer of Defendant, W. W. Hinchliffe, to Intervenor Ohio Oil Company's Plea in Intervention" (R. 17). This answer contains numerous exceptions to respondent's petition in intervention and a general denial (R. 17-19). That this is the pleading addressed by petitioner to respondent's petition in intervention is shown by recitals in the judgment that among the "trial pleadings" was "the first amended

original answer of defendant W. W. Hinchliffe to the petition in intervention of The Ohio Oil Company" (R. 38), and by recitals in the judgment that "came defendant W. W. Hinchliffe urging the special exceptions numbered I through X contained in his *first amended original answer to the petition in intervention of intervener The Ohio Oil Company*, and the Court having separately considered each of such special exceptions, it was ordered that each of such special exceptions should be and it was thereby overruled, and said defendant then and there in open court duly excepted to each of the court's rulings upon each of his special exceptions" (R. 38). This answer of petitioner contains no allegations raising in any manner whatsoever as against this respondent the Federal questions attempted to be raised by the pleadings described by petitioner at pages 2-4 of his petition for writ of certiorari, pleadings addressed to the petition filed in the trial court *by the other respondents.*

In the trial court this respondent did not except to the pleadings addressed to it by petitioner; and the trial court did not act upon any exceptions presented by this respondent (R. 38-39). The exceptions which the trial court sustained were exceptions addressed *by the other respondents* to pleadings of petitioner directed at them (R. 38-39).

In his brief filed in the Court of Civil Appeals, in his motion for rehearing in that court, and in his application for writ of error filed in the Supreme Court of Texas petitioner complained of the trial court's action in sustaining special exceptions leveled *by the other respondents* at his pleadings (R. 46-47,

53-54, 57-58). Petitioner did not complain and could not have complained of the trial court's action in sustaining any exceptions directed by this respondent to petitioner's pleadings because this respondent presented no such exceptions.

The Court of Civil Appeals in its opinion considered the trial court's action in sustaining special exceptions filed by the other respondents to petitioner's pleadings and in this connection discussed the Federal questions presented by petitioner (R. 48-49). Irrespective of whether or not that court decided any Federal question as to the other respondents, it is plain that it decided no Federal question *insofar as this respondent is concerned* because no such question was presented to it for decision. The Court of Civil Appeals was called upon to decide two suits which had been consolidated for trial, one suit filed by this respondent and the other filed by the other respondents. What that court had to say concerning the questions petitioner presents here was directed at the case made by the other respondents and petitioner, not *to the case involving this respondent and petitioner.*

From the foregoing it is plain that this Court should not take jurisdiction as to this respondent, first, because no Federal question was raised below as to this respondent; and, second, because no Federal question involving petitioner and this respondent was decided below. *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U. S. 341.

No Federal question could be raised as to this respondent and no contention could be made that a Federal question has been decided in the case in-

volving petitioner and this respondent even if petitioner could show the Court a pleading addressed to this respondent and containing the allegations relied upon by him to raise a Federal question because this respondent leveled no exceptions at petitioner's pleadings (R. 38-39). Consequently, if petitioner has pleaded against this respondent the facts relied upon by him to raise a Federal question, nothing done by this respondent or by the trial court has prevented proof of such facts as to this respondent. Under such circumstances petitioner's failure to prove such facts as against this respondent is not due to any action of the trial court concerning the pleadings but is due solely to petitioner's inability to prove such facts as against this respondent or to his decision not to prove them.

This respondent, in the exercise of an independent right given it by State law has succeeded in obtaining a final judgment canceling petitioner's permits. Even if it could be assumed, contrary to fact, that the Federal grounds of attack asserted by petitioner are substantial and valid as against other respondents, the judgment of the State court awarding this respondent cancellation of the permits would have to stand. The petition presents *no grounds* upon which this Court could properly disturb such judgment.

While this respondent believes, for the foregoing reasons, that its judgment is immune to attack, this respondent, in order that all phases of the case may be considered, presents the following points of argument, all addressed to the board proposition that no Federal question is presented by petitioner as against *any* respondent.

Second Point

No question of the equal protection of the laws or of due process of law is presented by petitioner's Points A, B, C, and D because petitioner does not complain of any action by the State or by any agency of the State.

Argument

Petitioner's Points A, C, and D present the same proposition, that the Railroad Commission has issued numerous drilling permits upon the basis of "more wells, more oil" testimony; that wells drilled under such permits are still producing oil from the East Texas field; and that to deny petitioner the right to sustain his permits upon the basis of "more wells, more oil" testimony denies petitioner the equal protection of the laws. Point B advances the proposition that, since the Commission "has granted permits for the drilling of oil wells to other persons where all the factors and conditions were the same as surrounded the granting of permits to" petitioner, petitioner has been deprived of the equal protection of the laws by the action of the State courts in holding his permits invalid.

No Federal question is presented by the foregoing points because petitioner does not complain of any action by the State or by any agency of the State. The due process and equal protection clauses of the Fourteenth Amendment govern State action or action by an agency of the State; they have no application to the action of private individuals. *Nixon v.*

Condon, 286 U. S. 73, 83. The Railroad Commission is an agency of the State, but petitioner does not complain of any action by the Commission. The Commission granted the permits desired by petitioner, with the consequence that petitioner is satisfied with its action. Petitioner does not complain that the treatment given him by the Commission differs from the treatment given others.

Nor, insofar as the question of equal protection is concerned, does petitioner complain of action by the State courts. Petitioner's pleadings to which exceptions were sustained (R. 22-25) contain no allegation that the treatment given other owners of permits by the courts varies from the treatment given him. He does not allege that the courts have upheld other permits upon the basis of "more wells, more oil" testimony and that to deny him the right to sustain his permits upon the basis of such testimony would discriminate against him. In fact there is not a single allegation in the pleadings involved concerning what action has been taken by the State courts with respect to permits granted others.

Petitioner's complaint comes to this: Other persons have obtained permits upon the basis of "more wells, more oil" testimony and no attacks have been made upon such permits, whereas petitioner, after having secured his permits has been hailed into court by respondents. If this raises any question at all as to discrimination, it raises a question involving the action of individuals. Discrimination, if any, resulting from respondents' action in bringing petitioner into court and from the failure of other interested parties to bring other persons securing

permits into court is not such discrimination as is condemned by the Fourteenth Amendment.

If by any stretch of the imagination petitioner's pleadings could be construed to allege that he has been denied equal protection because the State courts have sustained other drilling permits upon the basis of "more wells, more oil" testimony and have denied him the right to sustain his permits upon the basis of such testimony, his pleadings would raise no Federal question. Petitioner has no vested interest in the principle of *stare decisis*. The fact that the courts may have announced law in his case that is different from the law announced in other cases and that the courts have held his permits invalid, whereas, under similar facts, they have held other permits valid, presents no question under the Fourteenth Amendment. *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 681; *Fleming v. Fleming*, 264 U. S. 29, 31; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 450.

The point here made by this respondent shows that none of the petitioner's points raises a Federal question with the possible exception of that part of Point D which advances the contention that the action of the State courts in holding his permits invalid has resulted in the confiscation of his property. If any such proposition is advanced under Point D, it is fully answered by the opinion of the Court of Civil Appeals that petitioner has produced and will ultimately produce from his lease all the oil he is entitled to produce therefrom under rules of property laid down by the State courts. This question is discussed at pages 17-19, *post*.

Third Point

No Federal question is properly presented under petitioner's Points A, C, and D, because the matters relied upon by petitioner to raise such Federal question and pleaded by him in an attempt to raise such question are matters going to the very validity of the Railroad Commission's Rule 37, and consequently, under State law, are matters that must be presented in a suit brought as a direct attack upon Rule 37. Furthermore, petitioner, having obtained his permits to drill under the rule, is, under State law, estopped to contend in this proceeding that the rule is invalid.

Argument

Petitioner's pleading that the Railroad Commission has granted a number of drilling permits to prevent waste upon the basis of "more wells, more oil" testimony and that he is entitled to sustain his permits upon the basis of the same kind of evidence has, under state law, no place in this litigation, which involves the validity of orders entered by the Railroad Commission *under* the provisions of its Rule 37.

As pointed out at pages 3-4, *ante*, Rule 37 is a valid rule provided it is necessary, generally speaking, to drill wells in conformity with its spacing provisions of 330 feet and 660 feet to prevent waste. If it is true that the more wells that are drilled in the field the greater will be the ultimate recovery of oil therefrom, and waste thereby prevented, Rule 37 is invalid because there is no evidence to support the

finding of the Commission which necessarily must underlie it, the finding that, generally speaking, waste will be prevented by drilling wells in conformity with its spacing provisions. Furthermore, if, as alleged by petitioner, the Commission has construed the rule as authorizing it, or as requiring it, to issue drilling permits under the "waste" exception clause of the rule whenever an applicant for such a permit presents "more wells, more oil" testimony, and if such practical construction of the rule has become a part of it, there is no rule. Under such a state of facts, purely hypothetical, anyone who desires to drill a well and who requests a permit therefor is entitled to the permit as a permit "to prevent waste."

The State law is that a rule of the Railroad Commission cannot be collaterally attacked; that its validity must be tested in a direct proceeding brought for that purpose. *Texas Steel Co. v. Fort Worth & D. C. Ry. Co.*, 120 Tex. 597, 40 S. W. (2d) 78; *Trapp v. Atlantic Refining Co.* (Tex. Civ. App.), 169 S. W. (2d) 797, writ refused. Consequently, the State courts have held that the matters presented by petitioner in the pleadings he relies upon in support of his Points A, C, and D must be presented in a suit brought as a direct attack upon Rule 37; that such matters have no place in a suit involving, not the validity of Rule 37, but of orders of the Railroad Commission entered *under* the provisions of Rule 37. The State courts so held in a case involving allegations identically the same as those relied upon by petitioner here. *Trapp v. Atlantic Refining Co.* (Tex. Civ. App.), 169 S. W. (2d) 797, writ refused.

Consequently petitioner, if desirous of urging the matters relied upon here, must urge them in a suit brought as a direct attack upon Rule 37. He must proceed, if he can, by getting that rule out of the way; in which event he will be free to drill the wells here involved. He is not entitled to proceed by attacking the rule indirectly.

Since the State procedure affords petitioner a method whereby he can urge the matters relied upon by him, and since such method is exclusive, he must follow such procedure, unless it can be said that it has been laid down to defeat the claim of Federal right. *Hartford Life Insurance Co. v. Johnson*, 249 U. S. 490, 493. He has never claimed and does not now claim that the procedure laid down by State law does not afford him adequate protection for his Federal rights.

The wisdom of requiring matters involving the validity of Rule 37 to be presented in a suit directly attacking that rule is apparent. In the first place, any such suit must be filed against the Railroad Commission, which is not even a party to this certiorari proceeding and which was not an adversary of petitioner in the trial court. Quite obviously the Commission is vitally concerned with any litigation involving the validity of its spacing rule.

In the second place, a suit involving the validity of the rule itself should not be complicated by issues concerning the validity of orders entered *under* the rule.

Not only has petitioner failed to follow the exclusive procedure provided by State law for an attack upon Rule 37; he is estopped to attack the rule

in this proceeding. The State law is that a party who induces the Railroad Commission to issue him a drilling permit under either of the exception clauses of Rule 37, thereby affirming the validity of the rule, cannot in a proceeding involving the validity of such permit contend that Rule 37 is invalid. He is estopped to make such contention in such a suit. *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935; *Turnbow v. Barnsdall Oil Co.* (Tex. Civ. App.), 99 S. W. (2d) 1096, writ refused.

Fourth Point

No Federal question of substance is presented by petitioner's Points A, B, C, and D because the court below found that petitioner has and will produce from his L. J. Pinkston lease without the wells, permits for which are involved in this litigation, all the oil he is entitled to produce therefrom under State law.

Argument

Irrespective of the matters raised by the pleadings of the petitioner to which exceptions were sustained, only abstract questions are presented here because the court below found, and petitioner makes no complaint of the finding, that petitioner's property rights will be fully protected even though the permits here involved are canceled and the wells drilled thereunder closed in. While it is sometimes claimed that the rule of capture allows the owner of a lease to produce therefrom all the oil he can pro-

duce from such lease through wells drilled thereon, any such rule has, of necessity, been modified by the action of the legislature in conferring upon the Railroad Commission the authority to prevent waste by regulating the drilling of wells in oil fields and the production of oil from such fields. *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935.

Since this regulatory power has been conferred upon the Railroad Commission the rule of property in this State has been that the owner of a lease is entitled to produce therefrom an amount of oil equivalent to the oil that originally underlay such lease in recoverable quantities. *Brown v. Humble Oil & Refining Co., supra; Magnolia Petroleum Co. v. Railroad Commission* (Tex. Civ. App.), 93 S. W. (2d) 587, writ refused. The rule is sometimes stated a little differently, that the owner of a lease is entitled to produce oil therefrom on an equal basis with his neighbors. *Shell Petroleum Corp. v. Railroad Commission* (Tex. Civ. App.), 137 S. W. (2d) 797; *Wood v. Gulf Oil Corp.* (Tex. Civ. App.), 147 S. W. (2d) 818. In this litigation the Court of Civil Appeals found that petitioner will, without the wells, permits for which are involved in this litigation, "during the life of the field, produce a quantity of oil equivalent to the amount of oil in place beneath his tract"; and that petitioner, without the wells, permits for which are involved in this litigation, has "an equal opportunity with his neighbors to recover his fair share of the oil or its equivalent underlying his tract." (R. 50.)

It is clear from the foregoing findings of the Court of Civil Appeals that any questions presented here

by petitioner are abstract questions. Irrespective of what has happened, petitioner has not been injured and will not be injured since he has produced and will continue to produce all the oil he is entitled to produce under State law. His property rights have been fully protected.

Fifth Point

No Federal question of substance is presented by petitioner's Points A, C, and D because the fact that others may have been granted drilling permits in violation of law does not, by reason of the equal protection clause, entitle petitioner to sustain permits which are invalid under State law.

Argument

Petitioner's claim that he has been denied equal protection of the laws because others have been granted drilling permits upon the basis of "more wells, more oil" testimony, whereas his permits, which he seeks to sustain upon the basis of the same kind of testimony, have been held invalid, is nothing more nor less than a contention that, since others have violated the law and gotten away with it, petitioner is entitled to do the same thing.

If the Railroad Commission has in fact issued permits to others upon the basis of "more wells, more oil" testimony, the Commission has erred; it has acted illegally. And if those who have received such permits have drilled wells thereunder from which they are now producing oil, because no suits attack-

ing the validity of their permits have been brought, they have drilled wells in violation of the Commission's spacing rule and have gotten away with it. But this does not give petitioner the right to do the same thing. The fact that one citizen may have violated the law and not been brought to justice does not entitle another citizen, by reason of the equal protection clause, to do the same thing. *Saunders v. Lowry*, (C.C.A. 5), 58 Fed. (2d) 158; *Thompson v. Spear*, (C.C.A. 5), 91 Fed (2d) 430, cert. den. 302 U. S. 762; *People v. Montgomery* (Calif.), 117 Pac. (2d) 437, 445-446.

Sixth Point

No Federal question is presented by petitioner's Point B because the action of the courts below is, in so far as the question presented by said point is concerned, supported by a non-federal ground adequate to sustain it.

Argument

Under Point B petitioner contends that to deprive him of his permits would deny him the equal protection of the laws because the Railroad Commission "has granted permits for the drilling of oil wells to other persons where all the factors and conditions were the same as surrounded the granting of permits" to him (Br., p. 22). Petitioner's pleadings raising this question were excepted to by the other

respondents upon the ground, among others, that the matters alleged were "but the legal conclusion of the pleader, no facts being alleged upon which it can be adjudged whether the factors and conditions were all the same; and said allegation is vague and indefinite in that it does not name the other permittees or identify their leases, well numbers or Rule 37 permit numbers, and is too vague and indefinite to apprise plaintiffs of the permits which defendant contends were granted under the same conditions, nor are the conditions referred to by defendant described so that the Court and plaintiffs may know which surrounding conditions defendant refers to; so as to enable plaintiffs to investigate and be prepared to meet issue of proof whether or not such conditions are in fact the same as exist in defendant's lease" (R. 34). This exception was sustained by the trial court (R. 38-39), and the judgment of the trial court was affirmed by the Court of Civil Appeals (R. 51).

It is plain from the foregoing that petitioner's Point B, which seeks to predicate error upon the action of the trial court in sustaining exceptions to his pleadings concerning the granting of permits to others in instances where all the facts and circumstances were the same as in the case of petitioner, presents no Federal question because the trial court's action in sustaining the exceptions, action which was affirmed by the Court of Civil Appeals, is sustainable upon an adequate non-federal ground. If petitioner desired to preserve the Federal question which he attempts to bring forward in Point B, he should have amended his pleadings so as to meet

the trial court's ruling that the pleadings failed to apprise respondents of the facts petitioner intended to prove.

Conclusion

It is respectfully submitted that no Federal question of substance is presented by the petition for writ of certiorari and that the petition should be denied.

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